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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. WILLIE HARRIS, Defendant and Appellant.	B169309 (Los Angeles County Super. Ct. No. BA224193)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed.

Eric S. Multhaup, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Alan D. Tate, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Willie Harris appeals from the judgment entered following a jury trial that resulted in his conviction of first degree murder, possession of a firearm by a felon and evading an officer.[1] He contends he was denied the effective assistance of counsel. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal *(People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence established that the corner of St. Andrews and 50th Street is within an area claimed by the criminal street gang known as the Rolling 40's Crips. The gang known as the Dirty Old Men Crips, or DOM, is a relatively small gang active within the same area. In November 2001, the Rolling 40's and the DOM were engaged in a feud, which resulted in a series of violent shootings. Gang members might shoot a person in rival gang territory, even if that person was not a known gang member.

At about 8:30 p.m. on November 5, 2001, Wayne Pride was in the front yard of his home on St. Andrews Street, just north of 50th Street, when Okai Stinson, a neighborhood kid, walked by and said "hi." As Stinson continued walking south on St. Andrews, Pride noticed two Black males in a blue car without any headlights on drive slowly down the street in the same direction. After the blue car drove past him, Pride heard someone in the car yell, " 'F—K' something." He then saw at least 10 muzzle flashes come from a gun on the passenger side of the car. After the shooting, the car sped away. When Pride went to see what the men in the car had been firing at, he found Stinson lying on the walkway leading up to a house. Stinson died several hours later

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1 Defendant was charged by information with first degree murder (Pen. Code, § 187), possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1), and evading an officer (Pen. Code, § 2800.2, subd. (a)). Gun use, prior conviction and criminal street gang enhancements were also alleged. Defendant was convicted as charged and the jury found true the gun use and criminal street gang enhancement allegations. The trial court found true the prior conviction allegations, and defendant was sentenced to a total of 75 years to life in prison.

from multiple gunshot wounds. Stinson was not a gang member. When Officer Michael Barrios of the Los Angeles Police Department arrived at the location sometime between 8:35 and 8:50 p.m., he saw 17 shell casings scattered about the area.

Meanwhile, Officer Joseph Kuns of the Los Angeles Police Department and his partner, Sara Roman, were on patrol at about 8:45 p.m. when Kuns observed a blue Cutlass in which there were two Black males: a driver and front passenger.[2] Kuns began following the Cutlass because it was being driven aggressively and at a high rate of speed. After Kuns followed the Cutlass onto southbound 53rd Street, the Cutlass accelerated to about 50 miles per hour, twice the speed limit. Kuns activated his siren with the intention of conducting a normal traffic stop for speeding. When the Cutlass drove through a stop sign without braking, Kuns activated the lights and directed Roman to broadcast that they were in pursuit of the Cutlass. Kuns continued to pursue the Cutlass along a zigzag route ending at 56th and Flower Streets. During the pursuit, Kuns was able to get as close as three car-lengths to the Cutlass when it slowed for turns, but he did not see the license plate number. As the Cutlass turned right from 56th Street onto Flower, Kuns noticed a large black object come out of the passenger side window. Recognizing the object as a rifle, Kuns made the decision to stop and pick it up, rather than continue the pursuit. Kuns retrieved the item, an AK-47, and placed it in the back seat of the patrol car before proceeding west on 57th Street.[3] When Kuns heard over the radio that the pursuit had terminated at 40th Street and Hoover, he went to that location. There, he saw the vehicle he had been pursuing. He identified the car by its appearance, not its brand name.

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[2] Kuns testified that, at the time, he might have thought the car was a Buick because the Buick Regal and Olds Cutlass are identical in appearance, the only difference being their names.

[3] It was determined that this gun fired all 17 of the casings found at the murder scene.

Roman's account of the pursuit was the same as Kuns in all material respects. During most of the pursuit, the patrol car was about 200 feet from the Cutlass, but when the Cutlass slowed for turns, the patrol car got as close as 50 feet and Roman was able to see the license plate number. Roman did not, however, broadcast the license plate number. The Cutlass stopped at 40th and Hoover had the same license plate number as the car she and Kuns had been pursuing and from which they had seen the rifle tossed. Roman had no doubt that it was the same car.

Officer Jesse Estrada of the Los Angeles Police Department and his partner, David Sanchez, were also on patrol at about 8:45 that night, when Estrada heard a police radio broadcast that the car being pursued by Kuns and Roman had turned west onto 57th Street. Sanchez positioned his patrol car northbound on Figueroa at 57th Street. About five seconds after hearing the broadcast, Sanchez saw a 1982 light-blue Olds Cutlass, which matched the description of the suspect vehicle, traveling west on 57th Street at a high rate of speed. The Cutlass turned onto Figueroa. As it passed Estrada's location, Sanchez broadcast the Cutlass's license plate number and Estrada got behind the Cutlass to take over as the primary unit in the pursuit. Estrada pursued the Cutlass in a high speed chase which ended at 40th Place and Hoover, where the Cutlass stopped. There, Estrada and Sanchez conducted a high risk felony stop. Defendant, who was the driver, eventually complied with the officers' commands to get out of the car with his hands up. But another Black male got out of the passenger side and fled. That man was not located that night. Sanchez's account of the pursuit was substantially the same as Estrada's.

That same evening, Pride was transported to 40th and Hoover, where he identified the Cutlass being detained there as the car from which he had seen shots coming earlier that evening. When Pride spoke to the police earlier, he had not been sure of the make of the car, but recalled that it had distinctive "opera windows." Both the Regal and Cutlass had such windows.

Officer Ara Hollenback and his partner, Officer Nagata, arrived at 40th and Hoover after the pursuit ended. They were requested to transport defendant to the police

station. As they were accompanying defendant to their patrol car, defendant suddenly yelled out: "Fuck 40's. Fuck 4-0. Dirty Old Men Crips rule." Looking in the direction defendant was looking, Hollenback saw a Black male standing across the street, who yelled something unintelligible in response to defendant's statement. As Hollenback was driving defendant back to the station, he saw the other man flash gang signs at defendant. In response to Hollenback's questions about gang affiliation, defendant admitted that he was a member of the Dirty Old Men Crips, and that the Dirty Old Men Crips do not get along with the Rolling 40's Crips.

The defense presented no evidence.

DISCUSSION

There Was No *Griffin* Error

Defendant contends he was denied effective assistance of counsel as a result of defense counsel's failure to object to various statements made by the prosecutor during closing argument, which defendant argues were indirect comments on defendant's failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609, 614-615 (*Griffin*).[4] We disagree.

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[4] Defendant challenges the following statements made by the prosecutor during closing argument: (1) "And I want you to keep in mind while you review this evidence that you heard, while you review the 12 witnesses, while you review the 15 some odd exhibits, that there is one voice you haven't heard in this case. There is one voice that is forever silent in this case, and that is the voice of Okai Stinson. Because this man, [defendant], the proud Crip gang member, participated in and allowed for the brutal slaughter of Okai Stinson. [¶] His voice will never be heard again because of the defendant's actions. His voice will never be heard by his two younger children because of the defendant's actions. And all too often, the victim's voice is not heard. . . . And obviously in a murder case, you have not heard his voice. He is not here to tell you what happened. He is not here to get on that stand and tell you what happened because he was shot in the back with an assault rifle. [¶] I want you to keep that in mind when you review the evidence in this case, when you dedicate yourself to deliberating based on the facts and the law in this case, and when you reach a just verdict in this case finding the defendant guilty based on the facts and based on the law because of the defendant,

The law applicable to a claim of ineffective assistance of counsel is well settled. " ' "[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; . . . .) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (*Strickland, supra*, at pp. 691-692; . . . .) Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' . . ." [Citation.]' . . . .[Fn.]" The footnote reads as follows: "The issue of whether the *Strickland v. Washington* (1984) 466 U.S. 668 [citation] standard was changed by *Lockhart v. Fretwell* (1993) 506 U.S. 364 [citation] need not be reached

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[defendant], the Crip, the proud Crip, is guilty of each and every count." (2) "There is nothing to contradict that the defendant is a Dirty Old Man member [of the Crips] and has been active in the gang and committed this crime for this gang." (3) "If there was some contradictory evidence that defense counsel wished to put on, she had every right and opportunity to do so. [¶] You have to base your decision on the evidence you heard in the case and not on speculation. There's no evidence before you, ladies and gentlemen. There's no evidence at all supporting a reasonable interpretation of this evidence that points to innocence. There is not. This is not a complicated case. Every piece of evidence points to the defendant's guilt. And defense counsel was provided with the same information as the People are in this case. All the evidence points to the defendant's guilt." (4) "Defense counsel has the same exact power and authority to rely on the court's subpoena power to have witnesses come into court to subpoena witnesses, to do whatever she may need to do to prove the defendant's innocence. And I submit to you, if that evidence existed, defense counsel certainly would have presented it to you. But she cannot get up here and try to have you speculate about witnesses that did not testify or speculate about the evidence. If there was some contradictory evidence that defendant wished to put on, she had every right and opportunity to do so." And (5) "Ladies and gentlemen, every piece of reasonable evidence in this case points to the defendant's guilt. There is no evidence pointing to the defendant's innocence. Every reasonable piece of evidence in the case points to the defendant's guilt. And a summation of the evidence presented by defense counsel is just simply unreasonable."

because defendant's claim is clearly meritless under any articulation of the appropriate standard. [Citation.]" (*People v. Avena* (1996) 13 Cal.4th 394, 418.) Where the record on appeal sheds no light on why defense counsel acted or failed to act in the manner challenged, the judgment is affirmed unless counsel was asked for an explanation and failed to provide one or there simply could be no satisfactory explanation. (*Ibid*.)

The law related to *Griffin* error is also well settled. "Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify at trial runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt. (*Griffin v. California, supra*, 380 U.S. at pp. 614-615; [citation].) The prosecution is permitted, however, to comment on the state of the evidence, 'including the failure of the defense to introduce material evidence or to call witnesses.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 670 (*Lewis*); see also *People v. Sanders* (1995) 11 Cal.4th 475, 529; *People v. Clair* (1992) 2 Cal.4th 629, 662; *People v. Fierro* (1991) 1 Cal.4th 173, 213; *People v. Morris* (1988) 46 Cal.3d 1, 36.) In determining whether there has been *Griffin* error, we must determine whether there is a reasonable likelihood that the challenged comments could have been understood to refer to the defendant's failure to testify. (*People v. Clair, supra*, at p. 663.)

With these rules in mind, we conclude that none of the challenged comments in this case amounted to *Griffin* error. Defense counsel was therefore not remiss in failing to object to them and there was thus no ineffective assistance of counsel. First, the prosecutor's exhortation to the jurors that they keep in mind the fact that the victim's voice could not be heard because defendant killed him could not reasonably have been understood as a direct or indirect comment on the defendant's invocation of the right to silence. We do not agree with defendant's assertion that the "jury could not have

help[ed] but juxtapose that argument to the failure of the defendant, present in court, to tell the jury what happened."[5]

Regarding the prosecutor's various statements to the effect that defendant put on no evidence to contradict the evidence put on by the prosecutor, we find each of those statements was proper "comment on the state of the evidence, 'including the failure of the defense to introduce material evidence or to call witnesses.' [Citation.]" (*Lewis, supra*, 25 Cal.4th at p. 670.)

Defendant's reliance on *People v. Bradford* (1997) 15 Cal.4th 1229, for a contrary result is misplaced. In that case, the court held that "[a] prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided only by the defendant, who therefore would be required to take the witness stand." (*Id*. at p. 1339.) Here, as noted by defendant, it was not only defendant who could supply the contradictory evidence, but also the other man in the car, who successfully eluded police that night.[6]

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[5] In so concluding, we are mindful of the scope of permissible prosecutorial argument generally, about which our Supreme Court has noted " ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' " [citation], and he may "use appropriate epithets . . . ." ' " [Citation.]' [Citation.]" (*People* v. *Hill* (1998) 17 Cal.4th 800, 820.) Nevertheless, it is improper to appeal to the passion and prejudice of the jury in closing argument. (*People v. Simington* (1993) 19 Cal.App.4th 1374, 1378.) While the call to the jury to remember the victim was an appeal to the juror's emotions, and may have been so inflammatory as to constitute prosecutorial misconduct, it was not prejudicial. (Cf. *People v. Fields* (1983) 35 Cal.3d 329, 362-363 [prosecutor's closing argument speculating as to what victim must have felt during murder was misconduct, but not prejudicial where there was no reasonable probability that the appeal to the juror's sympathy for the victim affected the verdict].)

[6] We need not discuss the lower federal court cases cited by defendant because, while we are bound by decisions of the United States Supreme Court and, of course, by

Defense Counsel Made No Factual Misstatements During Closing Argument

Also without merit is defendant's contention that he was deprived of the effective assistance of counsel by his counsel's factual misstatements during closing argument. He argues that "[t]he deficiency in defense counsel's argument was the apparent effort to persuade the jury that Officer Roman had not testified that she saw the license plate during the pursuit, but that she saw it afterward when the car was stopped and detained." (Emphasis omitted.) We conclude that defendant misinterprets the challenged comments made by defense counsel as a misstatement of evidence, when those statements were actually *argument* and not intended as statements of the evidence at all.

The challenged statements arose from Roman's testimony that she was able to see the license plate number of the suspect car during the pursuit, and that the car stopped at Hoover and 40th had the same license plate number as the suspect car. The following colloquy then occurred: "[DEFENSE COUNSEL]: In fact, you didn't really know the license plate number until you went to Hoover and 40th; isn't that true? [¶] [THE WITNESS]: No. I knew the license plate number and I recognized it when we went to the termination of the pursuit. [¶] [DEFENSE COUNSEL]: But you failed to radio it? [¶] [THE WITNESS]: Yes. That was something that I should have done and I did not do, and I gave myself a hard time for later on."

During closing, the prosecutor argued that Roman was "able to personally observe the license plate" number of the car in which defendant was riding. Defense counsel countered with the following argument: "It's here that we have the big problem. No. 1, Officer Roman never radioed in that she had a license plate. Not at all. You heard her apologize. You heard her say, 'Oh, that is something that I regret forever.' *She didn't know the license plate number. The only time she knew the license number was way over here when she went up to 40th and Hoover after they had picked up the gun, after they*

California Supreme Court cases interpreting those decisions, decisions of lower federal courts are not binding precedent. (*People v. Madrid* (1992) 7 Cal.App.4th 1888, 1895.)

placed it in the back seat of the car, after they joined another pursuit at the end of 40th and Hoover. It was there that she saw the license number, and it was there that she marked down the license number in the police report."

On appeal, defendant characterizes the italicized portion of defense counsel's closing argument as a misstatement of the evidence. We, however, read the italicized portion not as a recitation of the evidence at all, but as "argument," which Black's Law Dictionary defines as: "1. A statement that attempts to persuade; esp., the remarks of counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of a decision-maker. 2. The act or process of attempting to persuade." (Black's Law Dictionary, 8th ed. 2004.) "Argument" is not an objective recitation of the evidence. It consists of pointing out desired inferences from the evidence. This is what the italicized portion of defense counsel's closing argument did. It articulated the theory of defense—that defendant's car, which was stopped at 40th and Hoover, was not the same car Kuns and Roman had been pursuing and lost sight of when they stopped to pick up the rifle, and that Roman was lying when she claimed to have seen the license plate during the pursuit.

Our understanding of defense counsel's statements is consistent with the counter argument made by the prosecutor in rebuttal: "[THE PROSECUTOR]: [Defense counsel] seems to cast doubt on the fact that Officer Roman saw the plate. She tries to, I guess, portray that this is some kind of conspiracy between the officers or among the officers regarding the license plate— . . . that this is some big lie or conspiracy orchestrated by these officers to bridge the gap, as she calls it. [¶] Interestingly enough, if this is a big lie or conspiracy by these officers, why wouldn't Officer Kuns say, I saw the plate too. . . ."

Inasmuch as we conclude defense counsel did not misstate the facts, there could not have been any ineffective assistance of counsel on this basis.

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P.J.

We concur:

BOLAND, J.

FLIER, J.